BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
Bank of America Tower
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DESERT COFFEE TECHNOLOGIES, Appellant, vs. ARIZONA DEPARTMENT OF REVENUE, Appellee.	Docket No. 1793-98-S **NOTICE OF DECISION: FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The State Board of Tax Appeals, having considered all evidence and arguments presented, and having taken the matter under advisement, finds and concludes as follows:

FINDINGS OF FACT

Desert Coffee Technologies ("Appellant") is an Arizona corporation which provides coin-operated, single-cup, coffee brewing vending machines to various businesses. Appellant provides its customers with coffee, chocolate, cream, sugar, and other condiments for use with the vending machines. The Arizona Department of Revenue (the "Department") audited Appellant for the period February 1, 1993 through December 31, 1996, and issued an assessment of transaction privilege tax and interest.[1] After unsuccessfully protesting the assessment to an Administrative Law Judge and the Director of the Department, Appellant now timely appeals to this Board.

DISCUSSION

The issue before the Board is whether Appellant is liable for the assessment. The assessment of tax is presumed correct and the taxpayer bears the burden of overcoming this presumption. *State Tax Comm'n v. Kieckhefer*, 67 Ariz. 102, 105, 191 P.2d 729, 732 (1948); *see also* A.A.C. R16-3-118 ("The burden of proof will be upon the appellant as to all issues of fact.").

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[1] The Department also assessed use tax which is not at issue in this matter.

Arizona transaction privilege tax statutes exempt certain business activities, including sales of food, from taxation. A.R.S. § 42-5101 (formerly A.R.S. § 42-1381). Appellant argues that it falls within two exemptions found in A.R.S. § 42-5102(A) (formerly A.R.S. § 42-1382(A)), which states:

> Except for the gross proceeds of sales or gross income from the sale of food for consumption on the premises, the taxes imposed by this chapter do not apply to the gross proceeds of sales or gross income from the sales of food by any of the following:
>
> . . .
>
> 3. A retailer who sells food and does not provide or make available any facilities for the consumption of food on the premises.
>
> . . .
>
> 6. Vending machines and other types of automatic retailers.

Appellant argues that these exemptions apply to the sales of hot beverages through its vending machines and that it is not liable for the additional assessment of transaction privilege tax. The Board disagrees.

In order for an item to constitute "food" for transaction privilege tax purposes, it must fall within the statutory definition. A.R.S. § 42-5101(3) states that "[f]ood means any food item intended for human consumption which is intended for home consumption as defined by rules adopted by the department pursuant to section 42-5106." The definition of "food" under A.R.S. § 42-5106(C) (formerly A.R.S. § 42-1387(C)) does "not include food for consumption on the premises . . . as food." "Beverages sold in cups, glasses, or open containers" are "food for consumption on the premises." A.R.S. § 42-5101(4)(e). Appellant's products are hot beverages dispensed into cups or open containers which are intended for consumption at the office or business location at the time they are purchased. Appellant's products are "food for consumption on the premises" and not food intended for home consumption, therefore Appellant's products do not fall within the definition of "food" for transaction privilege tax purposes.

Next, Appellant argues that the "vending machine exemption" should apply to its sales of hot beverages because its customers operate the vending machines in the same manner that they operate other vending machines that sell snacks, canned beverages, and other items that are exempt from tax. A.R.S. § 42-5102(A)(6). This exemption applies to the sale of *food* through a vending machine and does not apply to sales of *food for consumption on the premises*. Therefore, Appellant is not entitled to the exemption and is liable for the transaction privilege tax assessed.

The interest imposed represents a reasonable interest rate on the tax due and owing and is made part of the tax by statute; therefore, it may not be abated. *See* A.R.S. § 42-1123(B) (formerly A.R.S. § 42-134(B)); *see also Biles v. Robey*, 43 Ariz. 276, 30 P.2d 841 (1934).

CONCLUSIONS OF LAW

1. Appellant is liable for the transaction privilege tax assessed. *See* A.R.S. § 42-5101; *see also* A.R.S. § 42-5106(C).

2. The interest imposed represents a reasonable interest rate on the tax due and owing and is made part of the tax by statute; therefore, it may not be abated. *See* A.R.S. § 42-1123(B); *see also Biles v. Robey*, 43 Ariz. 276, 30 P.2d 841 (1934).

ORDER

THEREFORE, IT IS HEREBY ORDERED that the appeal is denied, and the final order of the Department is affirmed.

This decision becomes final upon the expiration of thirty (30) days from receipt by the taxpayer, unless either the State or taxpayer brings an action in superior court as provided in A.R.S. § 42-1254 (formerly A.R.S. § 42-124).

DATED this 26th day of July, 1999.

STATE BOARD OF TAX APPEALS

Stephen P. Linzer, Chairman

SPL:MAS
CERTIFIED

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